No 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,
Appellant and Cross-Appellee,

VS

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants

BRIEF FOR CROSS-APPELLANTS

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Cases Cited, and Other Authorities Referred To

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BRIEF FOR CROSS-APPELLANTS

I

STATEMENT OF THE CASE

The only two issues on cross-appeal are of law.

One: In this action of debt, in United States jurisdiction in China where common law strongly prevails, defendant cross-claiming, with profert in the pleadings,—was the judgment on the cross-claim responsive?

Two: On said cross-claim, which was on behalf of the National Bank of New York,—were certain "go-down warrants or trust receipts" held by that Bank equivalent in law to the warehouse receipts held by plaintiffs, the Chinese Banks?

Owing to omissions in federal appellate procedure at the trial and in preparation of appeal, cross-appellants acknowledge themselves limited, under appellate decisions, to presenting for review only the pleadings and judgment, the errors in the judgment being indicated in the assignment of errors.

China Press v Webb, 7 F 2d 581, 582

Wulfsohn v Russo-Asiatic Bank, 11 F 2d 715, 716

In the latter case, where a somewhat similar situation existed, this Court was of opinion, in the language of Circuit Judge Rudkin, that "The only questions subject to review, therefore, are rulings made during the progress of the trial, to which exceptions were reserved, and errors apparent from an inspection of the pleadings, process, and judgment".

Appeal from China is procedurally most difficult. This Court has borne with the situation very considerately. Our treaties with China obligate our government to maintain an adequate jurisdiction, including that of appeal. The Judge of our Court for China is given by statute extraordinary power to develop and administer the procedure of the Court, and the successive Judges have done much in such direction; but the Consular Court procedure with which they began in 1906 had become very firmly established, and in important features that procedure is necessitated

by conditions in China. To require, as the *Act of Congress, 34 St L 814, Sec 3,* does, that appeals or writs of error "shall be regulated by the procedure governing appeals within the United States from the district courts to the circuit courts of appeals" is an extraordinary burden for the China jurisdiction. Yet with the some twenty cases decided on appeal at San Francisco since the United States Court for China was created, we observe that only three have been outright dismissed, and those all in the year 1909 and for the sole reason that as judgments in actions at law the only way the judgments could have been brought for review was by writ of error,—a ground of dismissal we believe not now effective in view of enactment of the statute abolishing the writ. But there have been very many elements of the cases appealed from China that have failed of review, notwithstanding the considerate and constructively helpful adjudication maintained by the Circuit Court of Appeals.

However, the cross-appeal now before the Court we believe presents sufficiently for review the issues above mentioned.

The Chinese Banks brought action at Tientsin, China, against the assignee of an American warehouse company who had taken over from the company certain stored goods lying in the warehouse. The warehouse company had issued in favor of the Chinese Banks severally certain warehouse receipts for a total of 996,500 bags of certain brands of flour. The Chinese Banks presented the receipts before the assignment.

Delivery was refused. This led to discovery of shortage. The assignee, on taking over, found, instead of 996,500 bags of flour, only 91,666 bags. The brands were, however, the same as those specified in the warehouse receipts held by the Chinese Banks. Upon consent the assignee sold the 91,666 bags, realizing $300,489.86 Tientsin currency (exchange, we are informed, being at date of commencing this action such that one Tientsin dollar was equivalent on telegraphic transfer to San Francisco to forty-six and seven-eights cents United States currency). Upon realizing this amount the assignee proposed distribution. He recognized the validity of the warehouse receipts held by the Chinese Banks, but he also recognized as legally equivalent to them certain six documents held by the Tientsin office of the National City Bank of New York and described by that bank as "godown warrants or trust receipts" and representing a total of 161,000 bags of certain brands of flour stored, or supposed to be stored, in the warehouse. The Chinese Banks then brought this action against the assignee as indebted to them in the amount of proceeds of the sale of flour less the assignee's expenses and compensation for services. The assignee answered admitting all allegations of the complaint, including as part thereof the validity of documents including the warehouse receipts held by plaintiffs and represented by said documents, excepting only that he denied Paragraph 9 of the complaint, Tr 3. Paragraph 9 reads:

> "The plaintiffs deny that the National City Bank of New York is entitled to the said sum of $53,137.32 or to any sum in respect of the said flour, and the plaintiffs claim that the said sum

should be distributed amongst such of their number as hold warrants calling for flour of the brands in question. Subject to such readjustment the plaintiffs accept the proposals of the defendant."

And the answer alleged the legal equivalency of the documents held by the National City Bank with the warehouse receipts held by the Chinese Banks. The plaintiffs, in pleading their reply, denied this equivalency; admitted the National City Bank held the documents endorsed to itself, including admission textually of the endorsement to the National City Bank, but denied the goods referred to had been received by the warehouse company; alternatively, denied that if any of these goods were received, they were received under conditions constituting a valid pledge; and, again alternatively, that if received, the warehouse company was retaining the same in storage or having any property in them in respect of any such pledge when the warehouse company turned the goods over to the assignee.

Judgment was for the Chinese Banks to extent of all but 20,000 bags of the 161,000 claimed for the National City Bank, also as to 10,000 additional bags "in event that no flour of "Red Battleship" brand was taken over by the assignee".

The assignee appeals, and the Chinese Banks cross-appeal.

II

SPECIFICATION OF THE ERRORS RELIED UPON

Under the limitation accepted by the cross-appellants, the errors relied upon are those apparent upon the face of the record. Inspection of the pleadings and the judgment makes apparent two such errors.

In speaking of the judgment we refer to the language of the Court which is the last paragraph of what is designated "Decision and Judgment" and particularly to that part of the judgment from which the cross-appellants appeal, the language of which is:

> " . . . allotting to the National City Bank of New York $6,600.90, or $3,300.45 in the event that no flour of "Red Battleship" brand was taken over by the assignee, . . . and thereupon defendant is ordered to pay and distribute the same . . . to the National City Bank upon receiving their receipts therefor."

The references to Assignment of Errors are to the paper so entitled in the Transcript of Record upon Cross-Appeal and printed in the Transcript at pages 91-4; and the numbers given in the references are to the paragraphs so numbered in said Assignment of Errors.

Error One: The judgment does not conform to and is not supported by pleadings in an action of debt in which the pleadings included writings that defendant admitted proved the debt;

Error Two: Tho judgment is based upon holding a certain document to be a warehouse receipt which was, upon face of the record:

1 Fraudulent on part of the warehouse;

2 Of no effect because of prior assignment of the goods;

3 Taken with notice of being of no effect;

4 Or if of effect, then limited by prior assignment;

5 Issued out of course of legitimate warehouse business;

6 Issued for goods the property of a third party;

7 Issued to secure the warehouseman's own debt;

8 Not accompanied with possession required by law.

(Above matters numbered *1* to *8* are more fully stated in the Assignment of Errors, Tr. 91-4 and infra.)

From the complaint we quote Paragraphs 4-9 and prayer, and from the answer all paragraphs and prayer; we quote the reply, and the judgment; also parts of plaintiffs' Exhibit C, and all of defendant's Exhibits 2 and 3.

COMPLAINT: 4. The plaintiffs are severally holders of warrants issued by the Warehouse Company which call collectively for the delivery of 996,500 bags of flour of various brands. The said warrants have been submitted to the defendant and recognized by him, and such recognition has been confirmed by letter dated the 5th day of April, 1928, which is attached hereto. There is also attached hereto warrant No. 3671 in favour

of the Bank of China which is in the form of the several warrants above mentioned and which was the usual form of warrant issued by the Warehouse Company.

5. On or about the 9th day of July, 1927, the plaintiffs demanded delivery of the said 996,500 bags of flour against the said warrants, but the Warehouse Company refused to make any deliveries and on investigation by Messrs Borrows and Company, Limited, a firm of surveyors, it was estimated that the godowns of the Warehouse Company contained 91,895 bags of flour which on count was corrected to 91,666 bags only.

6. The said flour being part of the merchandise taken over by the defendant as stated in paragraph 3 hereof was sold, with the consent of the warrant holders, on or about the 16th day of September, 1927. The said flour realized a sum of $300,489.86 which is held by the defendant.

7. On or about the 17th day of January, 1928, the defendant issued a proposal for distribution of the said sum of $300,489.86, a copy of which is attached hereto.

8. The said scheme of distribution includes an allotment in favour of the National City Bank of New York, amounting to $53,137.32.

9. The plaintiffs deny that the National City Bank of New York is entitled to the said sum of $53,137.32 or to any sum in respect of the said flour, and the plaintiffs claim that the said sum should be distributed amongst their number as hold warrants calling for flour of the brands in question. Subject to such readjustment the plaintiffs accept the proposals of the defendant.

The plaintiffs therefore claim:

1. That the defendant as such assignee is indebted to the plaintiffs severally in sums aggregating $300,489.86, less expenses.

2. That the defendant shall hold the said sum of $300,489.86, less expenses, for the account of

the plaintiffs and shall distribute the same proportionately amongst the plaintiffs in accordance with the principle of the defendant's proposal for distribution above referred to copy of which is attached hereto.

3. Costs. 4. Such further and other relief as to this Honorable Court seems meet.

(Attached are copies of Exhibits made part of the Complaint: *A* Letter of defendant to plaintiffs' counsel recognizing their warrants as valid; *B* Form of plaintiffs' warrants; *C* Proposed distribution of proceeds.)

ANSWER: 1. The defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the plaintiffs' complaint.

2. The defendant denies the allegations contained in paragraph 9 of the plaintiffs' complaint, and alleges that the National City Bank of New York is the owner and holder of six certain godown warrants or trust receipts issued to said bank by the American Overseas Warehouse Company, Inc., which call collectively for the delivery of 161,000 bags of flour of various brands, and therefore said Bank is entitled to participate *pro rata* in the distribution referred to in plaintiffs' complaint.

Wherefore defendant prays that the plaintiffs' complaint be dismissed at plaintiffs' cost, and that he be given such further and other relief as to the Court may seem meet and just in the premises.

REPLY: 1. The plaintiffs deny that the National City Bank of New York is the holder of any

godown warrants or documents of the American Overseas Warehouse Company, Incorporated, entitled to rank with the warrants held by the plaintiffs.

2. The plaintiffs admit that the said Bank holds certain documents bearing an indorsement by the said Warehouse Company as follows: "We have received the goods mentioned in this instrument and will hold the same to the order of the National City Bank of New York and we hereby transfer all our rights under this instrument to the National City Bank of New York." But the plaintiffs deny that the said goods were ever received by the said Warehouse Company as alleged in the said endorsement.

3. By way of alternative defense to the defendant's claim on behalf of the National City Bank of New York, the plaintiffs deny that if any of the said goods were received by the said Warehouse Company, they were received under such conditions as constituted a valid pledge thereof.

4. By way of further alternative defense the plaintiffs deny that if any part of the said goods were ever received by the said Warehouse Company under such conditions as to constitute a valid pledge thereof, the said Warehouse Company continued to retain the same or had any property therein in respect of any such pledge or hypothecation on or about the 9th day of July, 1927, when the said Company ceased to do business and from which date the assignment to the defendant as assignee operated.

JUDGMENT: It is accordingly ordered, adjudged and decreed that the defendant revise and readjust his proposal for the distribution of the proceeds in his hands from the sale of the flour, in accordance with this opinion; allotting to the National City Bank of New York $6,600.90, or $3,300.45 in the event that no flour of "Red Battleship" brand was taken over by the assignee,

and increasing the allotments to the plaintiffs herein, as their interests may appear, and thereupon defendant is ordered to pay and distribute the same when so reallotted, to the several plaintiffs and to the National City Bank upon receiving their receipts therefor. Costs will not be awarded to either party.

EXHIBIT "C".

AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.

(In Liquidation)

PROPOSED DISTRIBUTION OF PROCEEDS FROM SALE OF FLOUR

The results were arrived at as follows:

From the amount available for distribution, $300,489.86, three per cent or $9,014.70 was deducted as trustee's fee leaving a balance of $291,475.16.

This amount, $291,475.16 was prorated on the basis of the total proceeds of the sale, $301,561.02, resulting in the following percentages:

Lotus	.30741	per cent=	$ 89,602.38
Green Battleship	35763	" =	104,240.26
Wheelbarrow	.14423	" =	42,039.46
Green Bamboo	.04961	" =	14,460.08
Egyptian	.04984	" =	14,527.12
Plain	.07162	" =	20,875.45
Double Fish	.01024	" =	2,984.71
Queen	.00092	" =	268.16
Green Castle	.00303	" =	883.17
Red Castle	.00182	" =	530.49
Mixed	.00365	" =	1,063.88
	1.00000	per cent	$291,475.16

The amount allocated to each brand was then prorated among the claimants. Plain was regarded as without brand and grouped and apportioned as Shanghai, Canadian and American plain. Double Fish, Queen and Mixed were not specifically claimed and the total amount received from these brands was prorated among all claimants.

. . .

NATIONAL CITY BANK OF NEW YORK.

Egyptian	$ 1,997.47
Lotus	25,927.49
Green Battleship	21,486.86
Shanghai Plain	3,125.07
Double Fish, Queen & Mixed	600.43
	$53,137.32

SUMMARY.

Bank of China	$ 12,631.08
Bank of Communications	15,326.06
China & South Sea Bank	105,081.68
Chinese American Bank of Commerce	39,513.22
Banque Franco-Chinoise	24,109.83
National Commercial Bank	21,527.11
Far Eastern Bank	15,564.52
Exchange Bank of China	1,305.97
Bank of Agriculture & Commerce	2,402.83
Agricultural & Industrial Bank of China	800.95
Chung Yuan Bank	74.59
National City Bank of New York	53,137.32
Total	$291,475.16

NOTE: The amount $300,489.86 is drawing interest at the rate of 2% per annum and the total accrued at date of final distribution will be pro rated among all claimants.

R. T. MCDONNELL,
Trustee.

EXHIBIT No. 2.

(Cause 3067—Exhibit 2 (sheet 1).

Tls.30,000.00/100 Tientsin, April 8, 1927.

On Demand for Value Received, I/We Unconditionally Promise to Pay to the Order of the American Overseas Warehouse Company, Inc. at the National City Bank of New York, Tientsin, China, the Principal Sum of Thirty Thousand and 00/100 Tientsin Taels, Together with Interest Thereon from Date at the Rate of 10 Per Cent Per Annum Until the Said Principal is Paid.

The undersigned has deposited with said Company as collateral security for the payment of this and any and every liability or liabilities of the undersigned to said company direct or contingent, due to or to become due, or which may hereafter be contracted or existing, and whether the same may have been or shall be participated in whole or part to others by trust agreement or otherwise, or in any manner acquired by or accruing to said Company whether by agreement with the undersigned or by assignment or by endorsement to it by any one whomsoever, the following property, viz.:

10,000 bags (net 49 lbs. each) Green Battleship Brand Flour @ 3.40..	$34,000.00
10,000 bags (net 49 lbs. each) Red Battleship Brand Flour @ 3.40..	34,000.00
	$68,000.00

together with all other securities in the possession of said Company, belonging to the undersigned or in which the undersigned has an interest, with authority to repledge and/or all of the said goods and/or securities hereby agreeing to deliver to said Company additional securities to its satisfaction upon its demand; also hereby giving the said Company a lien for the amount of all said liabilities of the undersigned to said Company upon all property or securities which now are or may hereafter be pledged with said Company by the undersigned, or in the possession of said Company in which the

undersigned has any interest. On the non-performance of said promise or upon the non-payment of any of said liabilities, or upon the failure of the undersigned forthwith to furnish satisfactory additional security on demand at the option of said Company, this obligation shall become immediately due and payable, and said Company is hereby given full power to collect, sell, assign and deliver the whole of said securities or any part thereof or any substitutes therefor, or additions thereto, through any stock exchange, broker's board, or broker or at private sale without advertisement or notice, the same being hereby expressly waived; or said Company at its option may sell the whole or any part of said securities or property at public sale, upon notice published once in any newspaper printed in the Province of Chihli not less than three (3) days prior to such sale, at which public sale said Company may purchase said securities or property or any part thereof free from any right of redemption on the part of the undersigned, which is hereby expressly waived and released. Upon any such sale, after deducting all costs and expenses of every kind, said Company may apply the residue of the proceeds of such sale as it shall deem proper toward the payment of any one or more or all of the liabilities of the undersigned to said Company whether due or not due, returning the overplus to the undersigned and in the event of sale of such security/ies, if the amount realized be insufficient to pay off this obligation and all interest, costs and charges then accrued, the undersigned agree/s and hereby promises to pay the deficiency then remaining unpaid, on demand of said Company or other holder or owner of this obligation.

The undersigned agrees to pay all expenses of warehousing and preserving the said property and all expenses incurred by the said Company in keeping said property in good condition; to deliver to the Company on the execution of this obligation valid and sufficient fire insurance policies, covering the goods hereby pledged, in the name of the

Company, with authority to the Company, if no such policies are delivered to it, to keep the said goods insured and the expense of said insurance to be a lien on the said goods.

The undersigned hereby authorizes any attorney-at-law in the Province of Chihli or elsewhere at any time after the above sum becomes due to appear for the undersigned in any Court in the Province of Chihli or elsewhere, and to waive the issuing and service of process and confess judgment against the undersigned in favor of the payee or any holder of this note for the amount appearing due and the costs of suit and thereupon to release all errors and waive all rights of appeal and stay of execution. The makers of this note, when more than one, shall be jointly and severally liable hereon. The undersigned further agrees to pay all attorneys' and collection fees, costs of court, publication, sale and expenses of every kind which may be incurred in enforcing payment of this note.

No. 17/1927.

Due 6 weeks—O. K.

THE UNION TRADING CORPORATION, INCORPORATED.

(Sgd.) .....

General Manager.

We have received the goods mentioned in this instrument and will hold same to the order of THE NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK.

THE AMERICAN OVERSEAS WAREHOUSE CO. INC.

(Sgd.) WILLIAM P. HUNT,
Acting Manager.

(Copy)
(Exh. 2, sheet 2.)

No. 3621

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

27 Seymour Road, Tientsin.

GODOWN WARRANT.

Tientsin, April 8, 1927.

Received the under mentioned goods in apparent good condition to be stored for account of National City Bank of New York.

Ten Thousand (10,000) Bags Green Battleship Brand Flour.

Ten Thousand (10,000) Bags Red Battleship Brand Flour.

This warrant covers insurance against Loss on damage by Fire or Lightning subject to the ordinary conditions of fire insurance.

The declared value of this warrant on the above mentioned goods is M$68,000.00/100 but in case of fire, the damage will be paid not exceeding the market value immediately anterior to the fire.

N. B. Not responsible for loss or damage by Earthquake, Typhoons, Storms, Floods, Effects of Climate and/or other Acts of God.

Responsible only for the delivery of the cargo in the condition received taking no cognizance of the contents of the packages.

All transfer of ownership of cargo to be immediately endorsed on this warrant. All charges against goods to be fully paid at the date of transfer.

All charges to be fully paid on delivery of all merchandise.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Seal) (Sgd.) WILLIAM P. HUNT,
Acting Manager.

EXHIBIT No. 3.

American Overseas Warehouse Co.

(Cause 3067—Exhibit 3.)

THE NATIONAL CITY BANK OF NEW YORK.

In CONSIDERATION OF THE NATIONAL CITY BANK OF NEW YORK (hereinafter referred to as the said Corporation) allowing me/us the undersigned to overdraw my/our account with the said Corporation or to open an overdrawn account with the said Corporation, I/we hereby pledge to the said Corporation as security for the repayment to the said Corporation on demand of all amounts due or which hereafter may become due from me/us to the said Corporation, as well as for all interest on such overdrawn account at the rate or rates charged by the Corporation and all costs and charges, all Stocks, Shares and Securities which I/we may have already deposited with the said Corporation, or which may be in their possession as also all Stocks, Shares and Securities which I/we may hereafter deposit with the said Corporation or which may hereafter come into their possession. AND I/we the undersigned hereby constitute and appoint as my/our Attorney for the purposes hereinafter mentioned the Manager or Agent for the time being in Tientsin of the said Corporation and specially authorize and empower him to fill up and complete any incomplete transfer attached to any of such Stocks, Shares and Securities, and to insert his name or that of any other nominee of the said Corporation therein as transferee of the Shares and Securities enumerated therein, and to sign, or as the case may be, to sign, seal, execute and deliver any such transfer or other document that may be necessary or required for the purpose of completing the title of the said Corporation to any of such Stocks, Shares, and Securities, and register the same in the books of the

Corporation to which the same relates, and obtain fresh scrip for the Shares and Securities enumerated therein in his own name or in that of any other employee of the said Corporation without any reference to or consent of me/us. Also to sell and absolutely dispose of all or any such Stocks, Shares and Securities in such manner as he may think fit without any reference to or consent of me/us. AND I/we hereby agree at the request of such Manager or Agent of the said Corporation to sign, or, as the case may be, to sign, seal, execute and deliver any transfer or other document that may be necessary or required by the said Corporation for the purpose of completing the title of the said Corporation to any of such Stocks, Shares and Securities. AND I/we further authorize the said Corporation to reimburse themselves out of the proceeds of any sale all costs, charges, and expenses incurred by them in transferring and selling all or any of such Stocks, Shares and Securities. AND I/we declare that the said Corporation shall not be responsible for any loss from or through any brokers or others employed in the sale of any of such Stocks, Shares and Securities, or for any loss or depreciation in value of any of such Stocks, Shares and Securities arising from or through any cause whatsoever. AND any deficiency whatsoever and however arising, I/we agree to make good and pay on demand to the said Corporation. AND it is further agreed that the said Corporation shall have a lien on all such Stocks, Shares and Securities or on the proceeds after sale thereof (if sold) as security for or in part payment of any other debt due or liability then incurred or likely to be incurred by me/us to the said Corporation. AND I/we further authorize the said Corporation to collect all dividends and bonuses payable or hereafter paid in respect of any of such Stocks, Shares and Securities, and engage to sign all such further documents as may be necessary effectually to vest in the said Corporation the property in the said Stocks, Shares and Securities, and

the dividends and bonuses payable in respect thereof [16] or to the effect the selling or transferring of the same. AND I/we further agree at all times to keep up the value of such Stocks, Shares and Securities. And in the event of a temporary or permanent depreciation in value of any of such Stocks, Shares and Securities at the request of the said Corporation or the Manager or Agent for the time being either to pay to the said Corporation in money the difference between the market value of any of such Stocks, Shares and Securities, on the date when they were deposited with or came into the possession of the said Corporation and on the date when such payment as aforesaid may be made, or to deposit with the said Corporation other approved Stocks, Shares and Securities, equivalent in value to the market deterioration. AND in the event of my/our failing to comply with such request I/we hereby authorize the said Corporation or the Manager or Agent for the time being to immediately exercise all or any of the powers hereby conferred upon them and him. AND I/we lastly declare that the said Corporation or the Manager or Agent for the time being shall not be answerable or responsible for any damage or depreciation which any of such Stocks, Shares and Securities may suffer whilst in their possession under this Agreement.

IN WITNESS WHEREOF I/we have hereunto set my/our hand and seal this 2d day of September, one thousand nine hundred and twenty-six.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Sgd.) C. H. CORNISH, (Seal)
General Manager.

Signed, sealed and delivered by....., in the presence of.....

(Signed) .....

We quote also, but for purpose only of readily referring to the same, the paper that is entitled Assignment of Errors and is printed in the Transcript of Record at Pages 91-4, omitting therefrom only the usual opening and closing and the prayer.

ASSIGNMENT OF ERRORS. 1. The Court erred in finding and deciding in its decision and judgment filed July 16th, 1928, that the National City Bank, of New York was entitled to participate in the proceeds of the flour held by the defendant as assignee of the American Overseas Warehouse Co., Inc., in respect of Warrant No 3621, dated April 8th, 1927, held by the National City Bank of New York and purporting to have been issued by the American Overseas Warehouse Company, Incorporated, in respect of 10,000 bags of Green Battleship flour and 10,000 bags of Red Battleship flour.

2. The Court erred in not holding and deciding that warrant No. 3621 aforesaid purporting to have been issued in respect of certain flour, having been issued by the American Overseas Warehouse Company, Incorporated, in support of and subsequent to an assignment to the National City Bank of New York of the benefit of the alleged pledge of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated the 8th Day of April, 1927, was of no effect.

3. The Court erred in not holding and deciding that the National City Bank being already assignee of the benefit of an alleged pledge of the flour purporting to be covered by warrant No. 3621 aforesaid, the said warrant was taken by the Bank with notice that the Warehouse Com-

pany only purported to have a special property in the said flour as pledgee, and was not in a position to issue in respect thereof a negotiable receipt such as the said warrant constituted.

4. The Court erred in not holding and deciding that the effect of godown warrant No. 3621 aforesaid in the hands of the National City Bank of New York was limited to the effect of the assignment of the benefit of an alleged pledge in respect of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated on the same day, namely, April 8th, 1927, but prior to the issue of said warrant.

5. The Court erred in not holding and deciding that the transactions between the Union Trading Corporation and the American Overseas Warehouse Company, Incorporated, and the assignments thereof to the National City Bank of New York were not transactions in the ordinary course of business of the American Overseas Warehouse Company, Incorporated, as warehousemen and could not be made the subject of godown warrants.

6. The Court erred in not finding and deciding that the position of the American Overseas Warehouse Company, Incorporated, in respect of the flour purporting to be covered by warrant No. 3621 aforesaid, could not be in a better position as pledgee than if purporting to be owner thereof, and that since a warehouseman cannot issue a valid warehouse receipt in respect of his own property the Warehouse Company could not issue a valid negotiable receipt in respect of the flour of which it was only an alleged pledgee.

7. The Court erred in not finding and deciding that a warehouseman cannot issue a valid warehouseman's receipt by way of security for his own indebtedness and that in consequence godown warrant No. 3621 aforesaid held by the National City Bank of New York invalid and of no effect.

8. The Court erred in finding and deciding that the legal effect of the transaction between the American Overseas Warehouse Company, Incorporated, and the National City Bank, of New York was that the Bank had deposited with the American Overseas Warehouse Company, Incorporated, the flour purporting to be covered by godown warrant No. 3621 aforesaid.

III

BRIEF OF THE ARGUMENT

The American Overseas Warehouse Company, Incorporated, conducted a public warehouse. A public warehouse is a place that is held out to the public as being one where any member of the public, who is willing to pay the regular charges, may store his goods and then sell or pledge them by transferring the receipt given him by the keeper or manager.

> *Security Warehousing Co v Hand,* CCA 2, 143 F 32, 40; affirmed, 206 US 415
>
> *Act of Congress,* 39 St L 486, as amended 42 St L 1282, an Act to make uniform the law of warehouse receipts in the District of Columbia. This Act, Sec 58, states that a "warehouseman", as the term is used in the Act, is "a person lawfully engaged in the business of storing goods for profit".

Storage of goods is the sole business. Members of the public entrust the warehouseman with their goods for the single purpose of safe custody. The warehouseman is not money-lender or banker. Any one who deals with a warehouseman on documents that in themselves show his irregularity, arising necessarily from his doing business for which he is unauthorized, has full notice that title attempted to be transferred by the warehouseman may be questioned and may be inferior or even void.

It is also essential to the warehouse business that possession of the goods have its record certain and clear. Title cannot be transferred through the warehouseman in usual and authorized course of business, and in extraordinary case of attempting to do so the

law requires, as the public knows, either that there be outright dispossession of the goods from the warehouseman into the possession of a third party or the making of public record and giving of due and effective notice to those entitled to notice.

> "Delivery of possession is the very life of a pledge. No mere agreements respecting possession can create it. The contract of pledge cannot exist outside of the fact of change of possession. The pledgor must dispossess himself openly, completely, unequivocally, and "without deceptive combinations which lead third persons into error as to the real possessor of the thing". *Security Warehousing Co v Hand,* CCA 2, 143 F 32, 41; affirmed, 206 US 415

One further premise, though general, is essential. The jurisdiction granted the United States by treaty with China and so greatly appreciated and strongly supported by American business men residing and doing business in China involves obligation upon our part to observe the laws of the United States suitable to be applied in China. And in doing business with the Chinese Banks, plaintiffs in this action, the American Overseas Warehouse Company, Incorporated, and the National City Bank of New York as claiming title from the warehouse company had the greater obligation both in the substantive law and the procedural.

POINT ONE: THE JUDGMENT IS NOT RESPONSIVE TO THE PLEADINGS, AND THEREFORE, IN THIS ACTION OF DEBT IN UNITED STATES JURISDICTION IN CHINA, REVERSIBLE.

The common law dominates in United States jurisdiction in China. Probably no United States jurisdiction has so little statutory law and so much common law as that of China. At common law the action of debt is one of the oldest and throughout the centuries most frequently used. Debt, as an action, firmly and permanently conforms to rights and obligations in substantive law.

> "It lay generally wherever an act of the plaintiff had benefitted the defendant in some certain sum of money which the defendant ought to pay; the duty creates the debt."
>
> Debt was not sustainable "unless the demand was for a sum certain, or for a pecuniary demand which could be readily reduced by reference or computation to a certainty."
>
> *Perry, Common Law Pleading,* 52

> "It is manifest that a witness oath, which disposes of a case by the simple fact that it is sworn, is not a satisfactory mode of proof. A written admission of debt produced in court, and sufficiently identified as issuing from the defendant, is obviously much better. . . . But a writing proved to be the defendant's could not be contradicted. For if a man said he was bound, he was bound."
>
> *Holmes, The Common Law,* 261

It is the requirement of "a writing proved to be the defendant's" wherein defendant "said he was bound" that appears to us to have been complied with

in the pleadings. But to that requirement, we are obliged to urge, the judgment does not respond.

> "On this subject this court is satisfied that the law of the action of debt is the same now that it has been for centuries past. That the judgment must be responsive to the writ, and must, therefore, either be given for the whole sum demanded, or exhibit the cause why it is given for less sum. Otherwise non constat, but the difference still remains due."
>
> *Hughes v Union Ins Co of Baltimore,* 21 US 294
>
> *United States v Colt,* (Opinion by Mr. Justice Washington) Fed Cas No 14839, reprinted at 5 L ed 727

In this case tried in China the answer of the Assignee of the Warehouse Company contained a cross-claim on which the judgment was supposed to rest. The cross-claim incorporated with itself by reference the "godown warrants or trust receipts" which are Defendant's Exhibits Nos. 1, 2 and 3, printed in the Transcript at Pages 15 to 28. The cross-claim also admits and relies upon as necessary to judgment Plaintiffs' Exhibit C, the proposed distribution of proceeds from sale of flour.

The judgment, supra 10 and Tr 50, reads, "allotting to the National City Bank of New York $6,600.90, or $3,300.45 in the event that no flour of "Red Battleship" brand was taken over by the assignee". Turning to the proposed distribution, Plaintiffs' Exhibit C, Tr 7, it is seen that the assignee listed no flour of "Red Battleship" brand. Therefore, in respect of the $3,300.45 the judgment is not in accord with the writ-

ing proffered by the cross-claimant in proof of his claim or debt, and the judgment is reversible for the error.

In other respects the judgment, on the other hand, may be said to aid the pleading of the cross-claim, this pleading being, we are obliged to note, somewhat inexpert. For example, the pleading of the cross-claim is uncertain and unintelligible in important respects, and, in an action at law, where it relies upon writings for affirmative relief, it prays only that plaintiffs' complaint be dismissed, with costs. What then of the remainder of the fund? But plaintiffs did not urge these particular defects at the trial. The defects they urged were to the writings themselves. The writings being insufficient and worthless in view of the law, the judgment was without basis so far as it could avail the cross-claimant. The argument on these matters we make under Point Two.

Under Point Two the argument, in most part, is that of Mr. Kent.

POINT TWO: THE "GODOWN WARRANTS OR TRUST RECEIPTS" HELD BY THE NATIONAL CITY BANK OF NEW YORK WERE NOT EQUIVALENT IN LAW TO THE WAREHOUSE RECEIPTS HELD BY THE CHINESE BANKS.

The use of the phrase "godown warrants or trust receipts" by the defendant implied that the terms "Godown Warrant" and "Trust Receipt" are interchangeable. But it is clear that a very wide difference exists between them. In order to appreciate the difference it is necessary to refer briefly to the circumstances in which they were issued respectively.

The principal client, although not the only client of the Warehouse Company, was a Chinese concern known as the Union Trading Corporation. This Company failed in July, 1927, involving the Warehouse Company which had been its chief instrument in respect of a series of extensive frauds. It was the custom of the Union Trading Corporation to store, or to purport to store, with the Warehouse Company flour and other merchandise, export and import, and to borrow money of the Chinese Banks on the security of the relative godown warrants. It was also its custom to borrow money from the Warehouse Company and to secure it, or to purport to secure it, by deposit or alleged deposit of goods by way of collateral security. In the former case a document of title was issued the signer of which, the Warehouse Company,

> "was estopped or not permitted to deny the existence of the facts represented in or by them".
>
> *Hale v Milwaukee Dock Co,* 29 Wis 482, 9 Am Rep 603

In the latter case at most the warehouse company acquired a special property in the goods as pledgee, while its assignee, without transfer of possession of the goods, could only look to the warehouse company as trustee. In consequence, the position of the National City Bank, which was that of assignee of the Warehouse Company, could only be that of the holder of a trust receipt of which the only security as against third parties was the good faith of the Warehouse Company.

This position becomes abundantly clear if the document be analyzed, when it will be found to fall into three parts:

(a) A promissory note from the Union Trading Corporation to the Warehouse Company;

(b) A deposit or purported deposit of goods by the Union Trading Corporation with the Warehouse Company as collateral security; and

(c) An indorsement by the Warehouse Company to the National City Bank in the following terms:

> "We have received the goods mentioned in this instrument and will hold same to the order of the National City Bank of New York and we hereby transfer all our rights under this instrument to the National City Bank of New York."

This latter, if further analyzed, amounts to a certificate that the goods have been received and an undertaking to hold them to the order of the Bank. This is a trust receipt and it is submitted, with respect, that no amount of reasoning can make it anything else.

There are also two reasons in law why this document cannot be regarded as a godown warrant.

(a) A document to be a warrant must include an indication of contract of storage.

Sinsheimer v Whitely, 111 Cal 378, 52 Am St Rep 192, 43 Pac 1109

In this case there was nothing in the indorsement to show a contract of storage between the Warehouse Company and the National City Bank of New York. There was in fact no liability on the Bank to pay storage. Nor can the obligation of the Union Trading Corporation to pay storage be considered to fulfil this want. In the first place the National City Bank, not being assignee of the Union Trading Corporation, but of the Warehouse Company, is not affected by the obligation of the Union Trading Corporation; secondly, the primary object and effect of the transaction was a pledge to the Warehouse Company and not a contract of storage. The fact that a pledgee expects to receive rent for the space occupied by bulky goods does not transform a bailment by way of pledge into a bailment for storage purposes, which is an entirely different form of contract.

(b) The facts show that the Warehouse Company was doing two forms of business. It was doing business as a warehouseman. It was also doing finance business, lending money to clients. Such businesses are distinct. And since the authority is clear that a man cannot constitute himself a warehouse of his own goods, it follows as a matter of principle that a warehouseman cannot in respect of his business transactions outside warehousing, fortify the position of his creditors by means of warehouse warrants. The headnote of a leading authority is as follows:

> "A warehouseman is one who carries on the business of receiving and keeping goods in storage for compensation. Hence one cannot be a warehouseman of his own goods."
>
> *Tradesmen's National Bank v Kent Manufacturing Co,* 186 Pa 556, 65 Am St Rep. 876

In the light of the foregoing, it is submitted with respectful confidence that the Court should have decided that the documents held by the National City Bank of New York did not constitute warehouse warrants. It then follows that they were trust receipts, and with the conclusion resulting without further argument that the Chinese Banks should prevail. The Chinese Banks had legal title to the goods, the National City Bank had not.

> "This belongs to the class of cases, unfortunately too common, where one of two entirely innocent parties must suffer from the fraud of a third. The decision must therefore follow the better title by strict law."
>
> *Tradesmen's National Bank v Kent Manufacturing Co,* 186 Pa 556, 65 Am St Rep 876

To discuss the position further would appear a work of supererogation. On the other hand, since the Chinese Banks were and are in a position to defeat the claim of the National City Bank on two other grounds, it seems a duty to submit further argument.

(a) It has been demonstrated that the foundation of the claim on behalf of the National City Bank was the transaction between the Union Trading Corporation and the National City Bank. This transaction, an

alleged deposit by way of collateral security, could, at most, be assigned the status of a pledge. For its validity, therefore, it was necessary to show the elements of pledge, the symbol of which in Roman law was the closed fist, emblematical of the possession of a definite identifiable thing. These requirements were adopted by the common law. It was clear, however, that there was nothing to distinguish one parcel of flour from another. If ever the incidents of pledge existed, they had long since disappeared.

Fourth Street Nat Bank v Milbourne Mills Co's Trustees, 172 F 177, 181-4

It is only desired to add in this connection that although this case was in bankruptcy, the principle is the same in the case of a voluntary assignment. On page 183 of the report, the judgment in

Girard Trust Company v Mellor, 156 Pa 579, 27 Atl 662

delivered by Chief Justice Sterrett is quoted as follows:

> "As a general rule in this state a debtor cannot, as against his creditors, assign personal property as security etc., and at the same time retain the possession thereof as theretofore. Possession must accompany the transfer as an essential part thereof. If the property is permitted to remain in the exclusive possession and control of the assignor, the transaction, while good as against himself, is a constructive or legal fraud upon his creditors, and may be so treated by them. To hold that exclusive possession may be retained by the debtor provided he agrees to hold as trustee until the same is demanded by his creditors or until default is made, would be to permit that to be done secretly and by indirection which the law condemns when done directly and openly. This principle is

so firmly grounded in our jurisprudence that no court of equity should lend its aid in the enforcement of a transaction which is not in harmony with the settled law on that subject. We think, the transaction in question clearly belongs to that class.

This case is particularly significant, in that the creditors were represented by an assignee by deed of voluntary assignment, who is supposed to stand squarely in the shoes of the assignor, but as against whom the attempted pledge was nevertheless declared void."

Here we have the American Overseas Warehouse Company in its capacity of warehouseman liable on its warrants for flour, and seeking for the benefit of its own private creditor to retain a portion of that flour.

(b) *"Nemo plus juris ad alium transferre potest quam ipse haberet."* A cestui que trust cannot be in a better position than his trustee. The National City Bank could not have been in a better position than the Warehouse Company.

If the Warehouse Company was pledgee, it could not be in a better position than if it were owner. It is pertinent to inquire therefore what would have been the position of the Warehouse Company had it been the owner.

In the first place it is to be noted that sacks of flour of the same brand not being distinguishable fall within the definition of fungibles in Article 58 of the Warehouse Receipts Act already cited. The law

Act of Congress, Aug 11, 1916, 39 St L 486, as amended Feb 23, 1923, 42 St L 1282,

in regard to title in the matter of fungibles is summarized in

27 *Ruling Case Law* 979 Sec 36,

under title "Warehouses," as follows:

> "When grain or other fungible goods are placed in warehouse and are stored in bulk under such circumstances that the transaction is classed as a bailment, not as a sale, the various depositors become tenants in common of the mass. This is so from the necessity of the case, because as soon as the goods are intermingled, each person's portion loses its identity and can no longer be distinguished or separated from the common mass. He continues as a tenant in common, not only while his grain is in the common store, but as long as any grain is so stored, and if the owner of the warehouse puts his own grain into the mass, he becomes as to such grain a tenant in common of the entire body of grain with the other owners. But when a deficiency arises in the grain, any which is still owned by the warehouseman is appropriated for the benefit of the holders of other warehouse receipts."

The authorities quoted in support are the cases of *Hall v Pillsbury,* 43 Minn 33, 19 Am St Rep 209, 44 N W 673, 7 L R A 529, and *Drudge v Leiter,* 18 Ind App 694, 63 Am St Rep 359, 49 N E 34

These cases are entirely in point with the present case and since they are cited in the modern publication Ruling Case Law, their validity may be accepted. In the latter connection it may be observed that the principle of the old common law of bailments have been developed in a series of closely reasoned decisions in States whose vast grain products have demanded adaptation. The obvious soundness of such judg-

ments, of which those just cited are notable examples, have appealed to the common sense of the American business and legal world and have stood the test of time.

Applying these principles it is clear that the National City Bank of New York could only come in after holders of warrants had been satisfied.

Again the unavoidable consequences of the foregoing analysis of the documents and the weight of authority produced on behalf of the Chinese Banks, the following points were made on behalf of the Assignee, representing the claim of the National City Bank.

(a) It was contended that the transactions between the Union Trading Corporation and the Warehouse Company and between the Warehouse Company and the National City Bank were simultaneous. It therefore was argued that the National City Bank was the direct mortgagee of the owner of the flour, and the Bank therefore had a title as mortgagee under a chattel mortgage.

With great respect it is submitted that such a contention is fantastic. In the first place there was no evidence to support such a proposition. The defendant called no witness and based his position entirely on the construction of the documents. In any case he must have pursued this course since evidence would not have been admissible to modify the written word. As submitted the documents showed clearly the course of events to have been: promissory notes accompanied

by alleged deposit of goods with the Warehouse Company for collateral security, followed by endorsement to the Bank. The terms of the indorsement negative such a pretension as is put forward on behalf of the bank since it reads the Warehouse Company had received the goods, held them to order, and gave the Bank the benefit of the within written instrument. If the transaction between the Union Trading Corporation and the Warehouse Company had not been complete, such a declaration and undertaking would have been without foundation and therefore of no effect.

Even if there had been evidence to suggest that the transactions had been as nearly as possible simultaneous, which there was not, it would still have been impossible to argue that the Warehouse Company had not been constituted the pledgee. The length of time was immaterial. At the moment the Union Trading Corporation signed the document the Warehouse Company became pledgee as the depositee of goods by way of collateral security. Directly that relationship was established the legal consequences followed and formed the foundation of the indorsement which must be read in subordination thereto.

As regards the contention that a chattel mortgage had been effected, it is clear on the facts that this was not the case.

> "Where title to property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge and not a mortgage."
>
> 21 *Ruling Case Law* 632 Sec 2, title Pledge

In this case there purported to be deposit by way of collateral security, and subsequently effective words of pledge were employed in favour of the Warehouse Company. This established a pledge. But if it could be construed as a chattel mortgage, the

> "assignment does not pass the legal estate to the assignee."
>
> 5 *Ruling Case Law* 441 Sec 74, title Chattel Mortgages

Again even if the theory of a chattel mortgage could have been supported on the facts, such alleged chattel mortgage would not have been valid any more than a pledge since particularity of object is called for. The goods comprised in the mortgage must be separated or otherwise distinguishable from other goods not subject to the mortgage.

> 5 *Ruling Case Law* 422, 426, Sec 53 and 58, title Chattel Mortgages

Since, in this case no flour could be distinguished as the property of or pledged to any person, it follows that the identity of the subject matter of the alleged chattel mortgage had been lost which necessarily caused the alleged chattel mortgage, even if it could be otherwise substantiated, to fail.

(b) It was argued that if the Chinese Banks had been free to contend that a valid pledge had not existed, owing to lack of identity of the subject matter of the pledge, it would have been equally open to the National City Bank to attack the warrant holders on the same lines. This, however, was not possible.

Whereas the law, if called upon to sustain a pledge, demands that all the incidents of pledge be present, and none of them were present in this case, the holder of the negotiable receipt of a warehouseman is under no obligation to identify the goods covered thereby. The warehouseman is in a sense a public servant. It is assumed that his honesty is above question. He resents any doubt of this kind. The holder of the warrant is entitled to delivery on presentation, and it is for the warehouseman to identify and deliver the identical goods, or, if fungibles, goods of the kind in the quantity called for.

(c) Defendant appears further to have argued that the title of the National City Bank was as much a legal title as the title of the Chinese Banks, that the legal title to goods did not pass to the warehouseman in respect of the goods stored with him and made the subject of warehouseman's warrants. Therefore he could not give legal title to holders of such warrants. And on that it could be suggested that the title in the holder of the warehouseman's receipt was no better than the title of the National City Bank as indorsee of the pledgee.

With great respect, it is submitted, this entirely overlooks the fundamental difference in principle between the two transactions.

In the matter of the document held by the National City Bank the Warehouse Company had a special property in the goods which it agreed to hold in trust for the Bank. That cannot by any possibility be described as a legal title in the Bank. The Chinese

Banks, however, held warehouse receipts which were admitted to be documents of title. In their position the owner of the goods deposited them with the Warehouse Company for storage purposes only and received a negotiable receipt either in his favour or in favour of the person to whom the goods were intended to be negotiated for purposes of security.

On all authority this constitutes a legal title. But the foundation of the title in the latter case is estoppel. This is clearly defined by Chief Justice Dixon of Wisconsin, in the case of

Hale v Milwaukee Dock Co, 29 Wis 482, 9 Am Rep 603

already cited:

> "The receipt of a warehouseman or wharfinger, and the receipt of bill of lading of a common carrier, are contracts of precisely the same general nature and effect, and should obviously be governed by the same rules and principles as to the application of the doctrine of estoppel or negotiability, which, with respect to such contracts, mean one and the same thing. They are or may be said to be negotiable or conclusive, in the hands of a bona fide assignee or holder for value, so far as the party executing them, warehouseman or carrier, has made, or is bound by, the representations contained in them. They are negotiable or conclusive and valid in the hands of such a holder, because the signer, or party by whom they are executed, is estopped, or not permitted to deny the existence of the facts represented in or by them, and which are presumed to have been within his knowledge at the time of their execution."

(d) Argument opposed to the Chinese Banks may also be that the language of the indorsement on the

document held by the National City Bank was indistinguishable in effect from the language in the godown warrants. It is submitted with great respect that it is quite impossible to suggest that legal consequences flow from language taken apart from its context and without reference either to the circumstances or to the legal position of the person who made himself responsible by using the words employed. The words were necessarily impressed by the capacity of the person using them, and in the case of the National City Bank document, the Warehouse Company, who employed the words, used them in respect of its special property as pledgee and in its private capacity to secure its own indebtedness to the Bank as opposed to its public capacity as a Warehouseman, which has already been demonstrated to be not recognized in law.

(e) Against the Chinese Banks it could be further argued that the warrant holders could be attacked on the ground that the flour had never been there. This may be doubted in view of the legal position stated in Sub-paragraph (c) above. However, the attack was not made and there is no issue in this connection. Yet it may be well to point out that the legal title was necessarily to be found somewhere amongst the warrants, and it must have been that many of the warrants were properly issued. The fact that all warrant holders agreed not to thresh out the question of relative validity as between the warrants but to pool the proceeds, did not provide a good foundation for an argument that the warrants could be regarded in the same weak position as the documents held by the

National City Bank. There was flour in the godown of several brands amounting to 91,666 bags. This flour must have been covered by some of the warrants, and therefore a legal title could always be established in favour of certain warrant holders. If the latter agreed *ex gratia* to share the proceeds with their friends that was their own affair.

The godown warrants on which Defendant relied merely accompanied and supported in effect the document of pledge from the Union Trading Corporation to the Warehouse Company, the benefit of which was endorsed over to the National City Bank. It follows, therefore, that the accompanying godown warrants were accepted by the National City Bank with full notice of the capacity in which the Warehouse Company assigned its interest, and therefore the godown warrant in the hands of the National City Bank could have had no greater value than the legal relationship between the several parties attached to the main documents warranted.

The true explanation of the position of the National City Bank would appear to be that it preferred to do its business with an American corporation under the management of American citizens. It was not concerned with the use made by that corporation of any loans which might be made by the Bank, so long as it considered itself adequately secured. The real foundation of the position of the National City Bank

was its confidence in the Warehouse Company, and it seems clear that it expected to find itself in an entirely favourable and even preferential position. Unfortunately for the Bank, either the Warehouse Company never received the goods on pledge or it delivered them to the owner or at the request of the owner to other persons, or it confused them with other goods so that they became indistinguishable. In other words the Warehouse Company and its management on whose integrity the National City Bank relied proved itself a fraudulent trustee.

In consequence the principles of Law governing the situation have to be applied with the following results:

(a) The Chinese Banks were entitled to be recognized, it is respectfully submitted, as having the superior title.

(b) In form the documents held by the National City Bank were trust receipts in respect of property alleged to have been pledged. They not only failed to satisfy the legal requirements of godown warrants or warehouse receipts, but they also failed in that they were not proved to have the incidents of pledge.

(c) Apart from these failures, lien must always yield to legal title; and since an assignee cannot be in a better position than his assignor, the National City Bank could only participate in the proceeds of sale of the flour in the godown after warrant holders had been satisfied. As there was not sufficient flour to satisfy the warrant holders, it follows that the National City Bank should have been, by reason of law, entirely excluded from participation.

IV

CONCLUSION

The judgment is reviewable for error apparent on the face of the record.

The warehouse receipts and assignee's plan of distribution, and the cross-claimant's "godown warrants and trust receipts" were, by rule of common law in action of debt, parts of the pleadings. The judgment is not responsive, and, therefore, at common law, reversible.

The judgment is specially not responsive in that the "godown warrants and trust receipts" pleaded by cross-claimant as equivalent in law to the warehouse receipts pleaded by claimant and admitted by cross-claimant to be valid and in effect were not so equivalent in law. To hold them equivalent was reversible error.

Wherefore cross-appellants respectfully appeal to the Honorable the Circuit Court of Appeals to reverse said judgment and to remand the cause with directions to enter judgment for cross-appellants, with their costs.

Dated, San Francisco,
May 15, 1929.

Respectfully submitted,

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